IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 2ND NOVEMBER 2007 / 11TH KARTHIKA 1929

SA.No. 2 of 1995(A)

A.S. NO. 102/1984 OF THE SUB COURT, KOCHI,
O.S. NO. 393/1980 OF THE PRL. MUNSIFF'S COURT, COCHIN.

APPELLANT/ APPELLANT NO.2/ ADDL. PLAINTIFF NO.3:

MRS. MERCY THOMAS, KIZHAKKETHOTTAM HOUSE,
KARUVELIPADY, COCHIN-5.

BY ADV. SRI.T.A.NARAYANAN NAIR.

RESPONDENTS/ RESPONDENTS AND APPELLANTS 1 AND 3 -
DEFENDANTS 1 AND 2 ADDL. DEFENDANTS 3 TO 5 AND ADDL. PLAINTIFF 2 & 4:

***1. ANTONY, S/O. VIRONI, CHERUKARETH HOUSE,**
CHULLIKKAL PARAMBIL, RAMESWARAM WEST MURI,
MATTANCHERRY VILLAGE (NOW THOPPUMPADY VILLAGE),
COCHIN TALUK, CHULLICKAL, KOCHI-5.

****2. GEORGE , S/O. VIRONI, MECHANIC OF DO,**
NOW RESIDING AT HOUSE NO. XIV/301-A,
ST. ANTONY'S ROAD, CHULLICKAL, KOCHI-5.

3. K.K. LILLY, MAPPILAPARAMBIL HOUSE,
KALARCODE, ALLEPPEY.

4. PUSHPI BOSCO, THOTTIPARAMBIL HOUSE,
UDYOGAMANDAL, MANJUMMEL.

5. DOLLY YESUDAS, KATANILAM PARAMBIL HOUSE,
KALLAI.P.O., KANNAMCHERRY, KOZHIKODE.

6. MRS. BABY ANTONY, CHIRYIL HOUSE,
KADEBHAGOM, PALLURUTHY,
KOCHI-6. (ADDL. PLAINTIFF NO.2).

S.A. NO. 2/1995:

7. MISS. OMANA PHILIP, CHERUKAREth HOUSE, HOUSE NO. XIV/1236, CHULLICKAL, KOCHI-5, (ADDL. PLAINTIFF NO.4).

****LEGAL REPRESENTATIVES OF THE DECEASED 2ND RESPONDENT:**

****8. THANKAMMA GEORGE, W/O. LATE GEORGE, AGED 48 YEARS, CHERUKAREth HOUSE, HOUSE NO. C.C. XIV/301.A, ST. ANTONY'S ROAD, CHULLIKKAL, COCHIN-5.**

****9. BENNY GEORGE, S/O. LATE GEORGE, 24 YEARS, CHERUKAREth HOUSE, HOUSE NO. C.C. XIV/301 A, ST. ANTONY'S ROAD, CHULLICKAL, COCHIN-5.**

****10. BETSY GEORGE, D/O. LATE GEORGE, AGED 22 YEARS, CHERUKAREth HOUSE, HOUSE NO. C.C. XIV/301 A, ST. ANTONY'S ROAD, CHULLIKKAL, COCHIN-5.**

****R.8 TO R.10 ARE IMPLEADED AS ADDITIONAL RESPONDENTS BEING THE LEGAL REPRESENTATIVES OF THE DECEASED R.2. AS PER ORDER DATED 30/07/97 ON C.M.P. NO. 524/96.**

***LEGAL REPRESENTATIVES OF DECEASED IST RESPONDENT:**

***11. MRS. ANNIE ANTONY, W/O. LATE ANTONY, AGED 52 YEARS, CHERUKAREth HOUSE, HOUSE NO. CC.14/2108, CHULLICKAL, COCHIN - 5.**

***12. JOSEPH ANTONY ALIAS KUNJUMON, S/O. LATE ANTONY, AGED 30 YEARS, CHERUKAREth HOUSE, HOUSE NO. CC.14/2108, CHULLICKAL, COCHIN-5.**

***13. MATHEW ANTONY ALIAS SIBY, S/O. LATE ANTONY, AGED 25 YEARS, RESIDING AT DO. DO.**

***14. VIRONI ANTONY ALIAS SINDHU, D/O. LATE ANTONY, AGED 21 YEARS, RESIDING AT DO. DO.**

***15. ANNIE ANTONY ALIAS SIBIL, D/O. LATE ANTONY, AGED 21 YEARS, RESIDING AT DO. DO.**

S.A. NO. 2/1995:

***16. JERSON ALIAS RAJESH, S/O. LATE ANTONY,
MINOR AGED 15 YEARS, RESIDING AT DO. DO.**

**(REPRESENTED BY THE NEXT FRIEND, THE MOTHER AND
GUARDIAN, MRS. ANNIE ANTONY, THE 11TH RESPONDENT HEREIN).**

***ADDITIONAL RESPONDENTS 11 TO 16 ARE IMPLEADED AS THE LRs OF DECEASED 1ST RESPONDENT AS PER ORDER DATED 12/11/97 ON CMP.1291/97.**

**BY ADV. SRI.S.B.PREMACHANDRA PRABHU,
ADV. SRI.S.K.BRAHMANANDAN.**

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 9/1995 IN S.A. NO. 2/1995

DISMISSED

02/11/2007. **SD/- M.SASIDHARAN NAMBIAR, JUDGE.**

//TRUE COPY//

prv.

M.SASIDHARAN NAMBIAR,J.

S.A .NO.2 OF 1995

Dated 2nd November 2007

J U D G M E N T

O.S.393/1980 was instituted by the deceased Vironi, mother of appellants and respondents 1 to 7. Prayers in the suit were

> Declaration of plaintiff's title "interest and possession" of plaint schedule property as per Ext.A2 deed of cancellation of Ext.A1 gift deed and consequential relief of permanent prohibitory injunction restraining defendants from trespassing into the plaint schedule property or committing any waste or making any fence or compound walls without permission of the plaintiff.

2. On the death of original plaintiff Vironi, appellants and respondents 6 and 7 were impleaded as additional plaintiffs 2 to 4, on the strength of Ext.A4 order of probate of District court, Ernakulam. Case in the plaint was that respondents 1 and 2 are her sons and by fraud, undue influence and

misrepresentation they got executed Ext.A1 gift deed and it is invalid, inoperative and null and void. It was contended that plaintiff did not part with possession under Ext.A1 and it was executed honestly with the belief that there is a partition of the assests to all her children, but by the said document some of her children are disinherited which she came to know only recently and thereafter Ext.A2 cancellation deed was executed revoking Ext.A1. Suit was filed on the allegation that respondents 1 and 2 attempted to trespass into the plaint schedule property and they have no right to do so. Respondents 1 and 2 in their written statement contended that Ext.A1 was voluntarily executed by the mother and it is not vitiated by undue influence, fraud and misrepresentation and it was accepted and acted upon and therefore mother is not entitled to cancel the same by executing Ext.A2 and Ext.A2 is not valid and the mother did not have any title to plaint schedule property and therefore she is not entitled to the decree sought for. After the death of original plaintiff, appellants and respondents 6 and 7 were impleaded on the strenth of the Will contending that they are entitled to the assets of deceased plaintiff. Respondents 3 to 5 were also impleaded thereafter being other daughteres of deceased Vironi.

3. Learned Munsiff on the evidence of Pws.1 to 4, DW1, Exts.A1 to A3 and B1 to B12 granted a decree holding that Ext.A1 gift deed was not proved to be voluntarily executed out of love and affection and it is vitiated and was not accepted and acted upon and therefore Ext.A1 cancellation deed is valid. But finding that on the death of Vironi her rights devolved on all her children and Will executed by Vironi in favour of appellants and respondents 6 and 7 were not produced and proved, it was held that they are not entitled to the decree sought for. Additional plaintiffs challenged the decree and judgment before Sub court, Kochi in A.S.102/1984. Learned Sub Judge originally allowed the appeal and granted a decree holding that as respondents 1 and 2 did not file a cross objection challenging finding of the trial court as against them and plaintiff alone filed the appeal, appellants are not entitled to challenge the findings against them. It was challenged before this court in S.A.632/1986. This court set aside the judgment of first appellate court and remanded the appeal to the first appellate court directing to dipose the same afresh holding that even without filing cross objection respondents are entitled to challenge the findings against them, while supporting the finding in their favour in an appeal

filed against dismissal of the suit. Learned Sub Judge thereafter re-appreciated the evidence and found that trial court did not appreciate the question and the evidence in the proper perspective. It was found that burden was wrongly cast on respondents 1 and 2 and there is no evidence to prove that Ext.A1 was vitiated by undue influence, fraud or misrepresentation as found by the trial court. On the evidence learned Sub Judge found that Ext.A1 was not vitiated and it was accepted and acted upon and once accepted, it cannot be revoked under Ext.A2 and deceased plaintiff has no title to be conveyed to the additional plaintiffs after Ext.A1 and dismissed the suit setting aside the finding of the trial court on issues 1,2,3, 6 and 8. That judgment is challenged in this appeal by the third additional plaintiff. Other additional plaintiffs were impleaded as respondents 6 and 7. On the death of first respondent his legal heirs were impleaded as respondents 11 to 16. On the death of second respondent his legal heirs were impleaded as respondents 8 to 10.

4. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether first appellate court was justified in holding that Ext.A1 gift deed is valid, without considering the allegation of

exercise of fraud.

2) Whether first appellate court was justified in shifting the burden to the additional appellants, in the light of the proved facts and evidence.

3) Whether on the evidence first appellate court was justified in holding that Ext.A1 gift deed was accepted and acted upon and cannot be cancelled under Ext.A2.

5. Learned counsel appearing for appellants and contesting respondents were heard.

6. Argument of the learned counsel appearing for appellants was that first appellate court did not properly appreciate the evidence at all. It was argued that judgment was pronounced after expiry of more than two years of hearing the appeal and in such circumstance, first appellate court could not appreciate the evidence properly. Relying on the decisions in **Mallo v. Bakhtawari and others (AIR 1985 Allahabad 160), Dhiren Bailung v. Must.Bhutuki and others (AIR 1972 Gauhati 44), Bancha Bhol and others v. Saria Bewa and others (AIR 1973 Orissa 18), R.Jamuna Bai v. Anusuya and others (AIR 2001 Madras 392), G.K.Krishnan v. Vasu and others (1992 (1) KLJ 144), Wali Mohammad v. Faqir Mohammad and others (AIR 1978 J.K 92) and**

Kunjikuttiamma v. Kunjikuttiamma (2001 (1) KLT 797). It was argued that first appellate court should have found that burden is on respondents 1 and 2 to prove that Ext.A1 gift deed was voluntarily executed. It was pointed out that there is no evidence to prove that Ext.A1 gift deed was attested by two witnesses as mandated under Section 123 of Transfer of Property Act and a valid gift deed is to be attested by at least two witnesses and first appellate court should not have upheld Ext.A1. It was also argued that evidence establish that Ext.A1 gift deed was not accepted and possession of the property continued with the donor till her death. Learned counsel also argued that evidence of DW1 establish that no mutation effected pursuant to Ext.A1 and tax was being paid by or for the mother, and in such circumstance, it should have been found that Ext.A1 was not accepted or acted upon. Learned counsel finally submitted that first appellate court should not have interfered with the findings of trial court on the validity of Exts.A1 and A2 and in view of Ext.A4 order in the probate O.P it should have found that plaint schedule properties originally belonged to deceased Vironi were bequeathed to appellants and respondents 6 and 7 and they are entitled to the decree sought for.

7. Learned counsel appearing for respondents

pointed out that as against the mandate provided under Rule 4 of Order VI of Code of Civil Procedure details of fraud, undue influence and misrepresentation were not pleaded at all and a case which was not pleaded cannot be looked into. Reliance was placed on the decision of Apex court in **Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others (AIR 1967 SC 878), Afsar Shaikh and another v. Soleman Bibi and others (AIR 1976 SC 163)**. Learned counsel also argued that the allegation in the plaint is against recitals in Ext.A1 cancellation deed and what is stated as the reason for cancellation of Ext.A1, seen in Ext.A2 is that donor intended to convey the right to the donees only after her life time and because of the execution of Ext.A1 she faced difficulties and therefore Ext.A2 was executed. There is no allegation of fraud or undue influence in Ext.A2. It is therefore argued that case pleaded against the recitals in Ext.A2 can only be rejected. Learned counsel relying on the decision of **Subhash Chandra v. Nagar Mahapalika (AIR 1984 Allahabad High Court 228)** argued that condition provided under Ext.A1 to pay Rs.1,500/- each to the two sisters does not mean that it is a consideration for the gift deed and finding of the trial court on that aspect is unsustainable. Learned counsel also argued that first appellate court

elaborately appreciated the evidence and found that Ext.A1 gift deed was accepted and acted upon and therefore it cannot be cancelled by executing Ext.A2 and the appeal is only to be dismissed.

8. Rule 4 of Order VI of Code of Civil Procedure mandates that in all cases in which a party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items if necessary shall be stated in the pleading. Apex court in **Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others (AIR 1967 SC 878)** considering the question of acceptance of a pleading and evidence on undue influence held that before a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out whether such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. Earlier decision in Ladli Prasad Jaiswal (AIR 1963 SC 1279) was quoted with approval as follows.

> "A vague or general plea can never serve this purpose;the party pleading must therefore be required to plead the precise nature of the influence

> exercised, the manner of use of the influence, and the unfair advantage obtained by the other".

Sufficiency of a pleading in a case of fraud and misrepresentation was again considered by another Bench of Apex court in Afsar Shaikh's case (supra). It was held,

> "While it is true that undue influence, fraud, misrepresentation are cognate vices and may, in part overlap in some cases, they are in law distinct categories, and are in view of Order VI, Rule 4, read with Order VI, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court."

9. In the light of settled legal position it is to be considered whether the pleading is sufficient. The allegation in the plaint is in paragraph 2. It

reads.

> "Defendants are sons of the plaintiff. By fraud, undue influence and misrepresentation a gift deed in respect of plaint schedule property was got executed by defendants. The said document is invalid and inoperative. It is null and void. Plaintiff was not parted with the possession as per said document. It was executed honestly believing that there is a partition with the assets of all the children of plaintiff. In the said document some of plaintiffs of the children are disinherited. Plaintiff came to know about the contents of the document only recently."

These are the only allegations in the plaint with regard to the vitiating factors of Ext.A1 gift. General allegation was that defendants are children and by fraud, undue influence and misrepresentation the gift deed was executed by defendants. What was the misrepresentation and what was undue influence or fraud were not at all pleaded. As rightly pointed out by learned counsel appearing for respondents, the pleadings are not sufficient pleading to constitute the vitiating factor of fraud, undue influence or misrepresentation against Ext.A1 gift deed.

10. As against the case of fraud, undue influence

and misrepresentation stated in the plaint, allegations made in Ext.A2 cancellation deed is also to be born in mind. When Ext.A1 was executed in 1974, Ext.A2 cancellation deed was executed only on 27/6/1980 after the lapse of about six years. What is stated in Ext.A2 for cancelling Ext.A1 gift deed is that with the intention that it is to come effect only after the death of the donor, incorporating specific conditions donor executed Ext.A1 gift deed in favour of defendants which was registered at Sub Registrar office, Kochi. Allegation was that Ext.A1 happened to be executed because of the pursuation and promises made by the sons and because of their undue influence and therefore it was cancelled thereunder. As per Ext.A2, Ext.A1 was executed by the deceased plaintiff with the knowledge that she is thereby giving the properties in favour of defendant sons on certain conditions imposed thereunder. But the allegation in the plaint was that she was honestly believing that it is a partition of assets to all the children and only later she came to realise that thereby she has disinherited some of the children. Both the contentions cannot go together.

11. Question whether Ext.A1 is vitiated by fraud, undue influence or misrepresentation is a finding of fact. Trial court relying on the decision of **Kartari v.**

Kewal Krishan & others (AIR 1972 Himachal Pradesh 117), Guljan Bibi v. Nazir-Uddin-Mia (AIR 1975 Gauhati 30), Koze & another v. Makhan Singh (AIR 1973 Madhya Pradesh 252) held that the donor being the mother and donees being the children and as the mother reposed confidence on her children, it is their burden to establish that mother executed Ext.A1 gift deed out of her love and affection and under her free will and fact that Ext.A1 is for consideration and therefore it is void. It is on that basis trial court found that under Ext.A2 the donor is competent to cancel Ext.A1 gift and defendants are not entitled to claim right under Ext.A1. First appellate court on re-appreciation of evidence found that burden is on the plaintiff to establish that Ext.A1 is vitiated by either fraud or misrepresentation or undue influence and they did not discharge that burden. Learned Sub Judge also found that it is the principle that burden to establish that the gift deed was executed voluntarily by donor is not on the donees. On the facts and circumstances of the case and evidence it is not established that Ext.A1 was vitiated by fraud, misrepresentation or undue influence. Finding of trial court that Ext.A1 gift deed is supported by consideration and therefore void is also not sustainable. Learned Sub Judge placed reliance on the

decision of the High Court of Allahabad in **Subhash Chandra v. Nagar Mahapalika (AIR Allahabad 228**). It is on that basis it was found that Ext.A1 gift deed is not vitiated. Question whether the donees are in a position to dominate the Will of another and whether the gift is vitiated by undue influence or fraud or misrepresentation are a finding of fact. Question is whether that finding of fact can be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure. Apex court in Afsar case (supra) held.

> "It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence is a question of fact and a finding thereon is a finding of fact and if arrived at fairly in accordance with the procedure prescribed, is not liable to be reopened in second appeal."

12. Argument of learned counsel appearing for appellants is that first appellate court did not apply the principle in the proper perspective and as plaintiff donor was a widow and illiterate, as found by trial court, burden should have been shifted on the donees and not on the donor and therefore the very approach

of first appellate court is not sustainable. Learned counsel placed reliance on the decisions in **Mallo v. Bakhtawai and others (AIR 1985 Allahabad 160) and Wali Mohammad v. Faqir Mohammad and others (AIR 1978 J.K 92)**. Facts of the cases considered by learned Single Judge of High Court Allahabad in Mallo's case (supra) establish that plaintiff in that suit was a widow for the last 30 years and she was illiterate. Following the principle to be applied in a case of a transfer, entered into by a pardahnashin lady, where burden of proof is always on the person who seeks to sustain a transaction to establish that the said document was entered into by pardahnashin lady after clearly understanding the nature of transaction, relying on the earlier decision of another Single Judge of Allahabad High Court in **Prasanth Rai v. Tileshra Khuar (1965 All LJ 1080)** it was held that in that case it was undisputed fact that plaintiff is illiterate and a widow for the last 30 years and evidence also establish that she was ignorant, inexperienced and also depend on others. It is on those facts learned Single Judge held that burden is on the defendants to establish that transaction was entered into by plaintiff after clearly understanding the nature of the transaction. Learned Single Judge had relied on the following observations of the decision of

Prasanth Rai's case (supra).

> "Rules regarding transactions by Pardahnashin lady are equally applicable to an illiterate and ignorant woman though she may not be a pardanashin. It is not by reason of the Pardah itself that the law throws its protection round a Pardahnashin lady but by reason of those disabilities which a life of seclusion lived by a Pardahnashin lady gives rise to, and which are consequently presumed to exist in the case of such a lady. But the disabilities which make the protection necessary may arise from other causes as well as old age, infirmity, ignorance, illiteracy ailing mental deficiency, inexperience and dependence upon others may be themselves create disabilities that may render the protection equally necessary. If it, therefore, proved that a woman, who is not a Pardahnashin lady, suffers from disabilities to which a Pardahnashin lady is presumed to be subject, the validity and the binding nature of a deed executed by her have to be judged in the light of those very principles which are applied to a deed by a Pardahnashin lady."

In Bancha Bhol and others v. Saria Bewa and others (AIR 1973 Orissa 18) which was also relied on by the learned

counsel appearing for appellants, it was found on the facts that both trial court and first appellate court that there was no payment of consideration and defendants were in a position to dominate the will of the vendor.

13. There is no evidence on that aspect in this case. Even though husband of the donor was not alive, Ext.A1 establish that when gift deed was executed the donor was only aged 54 years. Even when Ext.A2 cancellation deed was executed she was only aged 60 years as born out by the document. In such circumstance, it cannot be said that plaintiff was an old illiterate lady so as to attract the principle relied on by learned counsel. On the facts burden of proof cannot be shifted to respondents and when execution of the gift deed was admitted and gift deed was cancelled under Ext.A2 and it was contended that Ext.A1 is vitiated by fraud, undue influence and misrepresentation. But the burden is definitely on plaintiff to establish the vitiating circumstance. In the absence of proper pleading and sufficient evidence, first appellate court was justified in reversing the finding of trial court and holding that Ext.A1 gift deed is not vitiated by either fraud, undue influence or misrepresentation. As rightly found by first appellate

court direction in Ext.A1 to pay fixed amount by donees to their sisters, the daughters of the donor cannot be interpreted as consideration for gift deed. Under Section 122 of Transfer of Property Act gift is transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor to another, called donee, and accepted by or on behalf of the donee. Consideration as defined under Section 2(d) of the Contract Act is when at the desire of the promisor, promisee or any other person has done or abstained from doing or does or abstain from doing or promises to do or to abstain for doing, such act or abstinence or promise is called a consideration for the promise. Question of consideration in the case of gift was considered by Apex court in **Soniya Bhatia v. State of U.P. (AIR 1981 SC 1274)**. It was held that from a conspectus, therefore of the definitions contained in the dictionaries and the books regarding a gift of an adequate consideration, the inescapable conclusion that follows in is consideration means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee or where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift

and assumes a different colour. Love, affection, spiritual benefit and may other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place. Ext.A1 does not show that any consideration was paid by the donees to the donor which would make the gift invalid. What is provided under Ext.A1 is the condition imposed by the donor on the donees that they have to pay certain some of money to the daughters of the donor. By any interpretation it cannot be termed as consideration for the gift deed.

14. Similar question was considered by Division Bench of Allahabad High Court in **Subhash Chandra v. Nagar Mahapalika (AIR 1984 Allahabad 228)**. In that case while executing a gift deed, donor imposed a condition that donee would set up a school in his name and would permit him to live in one of the small rooms and would pay him Rs.100/- per mensum as maintenance. Question considered was whether payment of Rs.100/- per month imposed as condition would be treated

as consideration for the gift deed. Division Bench held that undertaking by donees to pay a token sum as maintenance. In the circumstances of the case, it could amount to a consideration and defeat the gift. Therefore condition in Ext.A1 that defendants have to pay the amount named thereunder to his sisters, cannot be termed as a consideration for the gift and on that account it cannot be said that Ext.A1 is not valid. Finding of first appellate court that Ext.A1 is valid is perfectly correct.

15. Argument of the learned counsel appearing for appellants is that a gift deed is to be attested by two attesting witnesses and without examining anyone of the witnesses, first appellate court should not upheld Ext.A1. True, Section 123 mandates that a gift deed is to be effected by a registered instrument sent by or on behalf of donor and attested by two witnesses. Ext.A1 shows that it was attested by two witnesses. Therefore condition provided under 123 was satisfied.

16. Question is whether it is mandatory that attestors should be examined before court to accept Ext.A1. Section 68 of Evidence Act provides for the proof of execution of documents required by law to be attested. Under the section if a document is required by law to be attested, it shall not be used as evidence

until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. Proviso is applicable only in the case of a Will. Therefore, examination of at least one of the attesting witness, as provided under Section 68 is necessary, if execution of the gift deed was deemed and is to be proved. When execution is admitted there is no necessity to examine the attesting witnesses to prove the gift deed. Plaintiff has not only disputed the execution of the document but also admitted execution and later cancelled the same under Ext.A2 cancellation deed. Therefore, for non examination of the attesting witnesses Ext.A1 cannot be challenged.

17. Argument of learned counsel appearing for appellants then is that there is no evidence to prove that Ext.A1 was voluntarily executed. When execution is admitted and it is contended that it is vitiated by the pleaded vitiating circumstances, burden is on the plaintiff to establish that fact. First appellate court on the evidence rightly found that Ext.A1 is not vitiated and was voluntarily executed by the donor plaintiff.

18. Then the question is whether Ext.A1 was acted

upon. If Ext.A1 was accepted and acted upon gift cannot be cancelled thereafter. Therefore, crucial question is whether Ext.A1 gift deed was accepted and acted upon. On appreciation of evidence it was found that gift deed was accepted and acted upon by the donees. Argument of learned counsel is that taxes were paid in the name of the donor and donor continued her residence and original gift deed was produced by the plaintiff and in such circumstances, it is to be taken that the gift deed was not accepted and acted upon. As rightly argued by the learned counsel appearing for respondents, Ext.B2 establishes that in 1978 building was transferred in the name of second respondent Exts.B3 to B8 would also establish that tax was paid by the donees. Fact that tax was received in the name of the donor will not make any difference, so long as entry with regard to the ownership of the property was not changed in the records. In such circumstances, I do not find any reason to interfere with the findings of first appellate court that Ext.A1 gift deed was accepted and acted upon. Added to this, Exts.B11 and B12 receipts obtained from the daughters, to whom the donor directed the donees to pay the amount in 1975 establish that acting upon Ext.A1 gift deed the donees paid the amount. Learned counsel appearing for appellants also argued that the receipts

were not proved. Both the executants of Exts.B11 and B12 are parties to the suit. They are not siding with respondents. In such circumstances, it is for them to come to the box and depose that they did not execute the receipts. First appellate court on the evidence found that Ext.A1 gift deed was accepted and acted upon by the donor. In such circumstances, I do not find any merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.2 OF 1995

2nd November 2007

==========